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In the Supreme Court of the United States

OCTOBER TERM, 1978

CLAUDE DORSY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. McMURRAY
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A-1).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1979 (Pet. App. A-1). A petition for rehearing was denied on May 24, 1979. On June 18, 1979, Mr. Justice Powell granted an extension of time within which to file a petition for a writ of certiorari to and including July 23, 1979, and the petition was filed on July 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prosecution's failure to furnish petitioner with a copy of a report of the Federal Home Loan Bank Board deprived him of a fair trial under the principles of *Brady* v. *Maryland*.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one conspiracy count and 13 substantive counts alleging that he caused persons to make false statements in loan applications submitted to federally insured savings and loan associations, in violation of 18 U.S.C. 2, 371, and 1014. He was sentenced to two years' probation and fined $7,500 on the conspiracy count and to a concurrent term of two years' probation and a $13,000 fine on the substantive counts.

The evidence presented at trial disclosed that petitioner was engaged in the business of developing condominiums in Southern Florida. In order to arrange financing for his condominium projects, he induced certain persons to make false statements on mortgage applications presented to savings and loan associations. The mortgage applications in question stated that various applicants had made cash downpayments for their condominiums when, in fact, no such downpayments had been made (Tr. 286, 303, 351).[1] In furtherance of this scheme, petitioner caused two of his employees to open accounts at savings and loan associations in the name of mortgage applicants

[1]The funds falsely described as cash downpayments were in fact credits advanced by petitioner or businesses controlled by him (Tr. 231, 401). The amounts in question were thus liabilities, rather than assets, of the prospective borrowers and should have been listed as such (Tr. 241).

and placed money in the accounts in order to enhance their apparent creditworthiness (Tr. 228-230, 272-276, 302-305, 351). Those funds were described in the loan applications as assets of the individual borrowers, not as liabilities.

The government also presented evidence showing that petitioner caused his employees and other persons to execute loan applications that omitted or misrepresented material information (Tr. 285-286, 299, 390). Some of the applications so executed were never signed by the borrowers whose names appeared on the applications (Tr. 348, 377, 385-386). Petitioner paid some of the individuals who executed the applications (Tr. 283-284, 297, 390). He admitted to one such person that the legality of the mortgage applications was in a "gray area" (Tr. 295).

Officers of the creditor savings and loan associations testified that they understood that borrower downpayments were in the form of cash (Tr. 30, 83, 179), and that no secondary financing was involved (Tr. 106). Charles Summers, an officer of Dade Federal Savings and Loan Association, testified that if he had known that the mortgagees had made no cash downpayments, he would not have recommended an extension of credit (Tr. 179). Other witnesses confirmed that savings and loan associations rely generally on the information contained in credit applications in determining whether to grant mortgage loans (Tr. 83-84, 100, 136, 207, 716).

ARGUMENT

Petitioner contends (Pet. 7-11) that he is entitled to a new trial because the prosecution failed to produce a Federal Home Loan Bank report concerning the lending practices of one of the savings and loan associations described in the indictment (Dade Federal Savings and

Loan Association). He asserts that this failure deprived him of a fair trial within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Both the district court and the court of appeals correctly rejected that contention.

1. After the return of his initial indictment, petitioner moved for production of examination reports of the Federal Home Loan Bank Board concerning savings and loan associations described in the indictment to the extent that those reports related to the condominium projects referred to in the indictment or to petitioner or his agents. The government objected to this request. Following the return of a superseding indictment in March 1978, petitioner made a general request for exculpatory materials. Petitioner did not make a specific request for reports relating to the Dade Federal Savings and Loan Association until April 10, 1978—two days before the commencement of trial. At a hearing on petitioner's request, the prosecutor stated that a court order would be necessary prior to releasing the Federal Home Loan Bank Board's confidential examination report. On April 13, the court ordered the document to be produced for *in camera* inspection, and it received it from the government on April 20. On April 21, the court ordered production of certain portions of the report. By this time, petitioner had been convicted, and the question presented was whether the document was of such importance as to require a new trial. The district court reserved decision on that issue, noting that it was not suggesting that the information in the report "would have been significant with regard to the verdict returned" (April 21, 1978 Order at 2). The court also noted that petitioner's request for the report appeared to be untimely and that the information in the report was "cumulative" (*ibid.*).

Subsequently, the district court denied petitioner's motion for a new trial, holding that petitioner was not "prejudiced by reason of the failure to have available the requested and sought discovery prior to trial," and that the report in question would not "have created a reasonable doubt as to Defendant's guilt or innocence" (June 21, 1978 Order at 3). The district court again noted that the evidence in question was "cumulative" and that petitioner had failed to make "a timely request for production" (*ibid.*).[2]

2. Under these circumstances, petitioner's reliance on *Brady* v. *Maryland* is misplaced. *Brady* requires a new trial only where the undisclosed evidence would be "material" to the defense. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972). As the Court noted in *Agurs*, *supra*, 427 U.S. at 109-110:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

In order to sustain his burden on a motion for a new trial, the defendant must establish that the evidence in question creates a reasonable doubt regarding his guilt that would not otherwise exist. *Id.* at 112.

As the courts below properly concluded, the report of the Federal Home Loan Bank Board does not create a reasonable doubt regarding petitioner's guilt. The report criticizes the Dade Federal Savings and Loan Association for adopting lax credit policies and for failing to conduct

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[2]The district court's April 21, 1978 and June 21, 1978 Orders are reproduced in the appendix attached to this brief.

adequate investigations prior to approving loans for petitioner's condominium projects. But the negligence of various employees of the federally insured savings and loan association, or their nonreliance on false information, provides no defense to petitioner. 18 U.S.C. 1014 makes it a crime for any person to "knowingly make [ ] any false statement or report * * * for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any * * * loan." Thus, the government establishes criminal liability by proving that the defendant has made or caused to be made a false statement for the specified purpose. Complicity or negligence by officers of the financial institution does not absolve the defendant of criminal liability. See, *e.g.*, *United States* v. *Fairbanks*, 541 F. 2d 862, 863-864 (10th Cir.), cert. denied, 429 U.S. 1002 (1976); *United States* v. *Braverman*, 522 F. 2d 218, 223 (7th Cir.), cert. denied, 423 U.S. 985 (1975); *United States* v. *Niro*, 338 F. 2d 439, 440-441 (2d Cir. 1964); *United States* v. *Goberman*, 458 F. 2d 226, 229 (3d Cir. 1972). The evidence presented by the government in this case showed that petitioner conspired to make, and caused other persons to submit, false statements in loan applications and that those false statements had the purpose and capacity to influence federally insured financial institutions. Because the examination report of the Federal Home Loan Bank Board had no tendency to rebut that showing of guilt, its nondisclosure does not violate the rule in *Brady*.[3]

[3]Moreover, as noted by the district court, the substance of the report was cumulative. Counsel established on direct and cross-examination of various witnesses that some of the financial institutions did not rely substantially on the contents of loan applications, that factors other than cash down payments were of importance in extending credit, and that information in credit applications was not always verified (Tr. 76-80, 113-119, 168-170, 611-674, 699-706, 717-723). Nondisclosure of cumulative evidence does not require a new trial. *United States* v. *McCrane*, 575 F. 2d 58, 61 (3d Cir. 1978).

3. Petitioner further contends (Pet. 10-11) that the examination report of the Federal Home Loan Bank Board could have assisted him in cross-examining one of the government's witnesses (Charles Summers) because it indicated that the witness had become involved in a conflict of interest in his administration of certain loans on petitioner's condominium projects. However, even if this information served generally to undermine the credibility of the government's witness, it would not suggest doubt about petitioner's guilt. As noted by petitioner (Pet. 10), the substance of the testimony of the witness was that he believed that actual cash down-payments had been made by mortgage borrowers, and that he would not have recommended an extension of credit to such persons if he had known that no cash down-payments had been made. Impeaching the credibility of this witness on these points could not have raised a reasonable doubt about the dispositive issue in this case—whether petitioner knowingly caused the filing of false information for the purpose of influencing an extension of credit.[4]

[4]The trial court also was correct in concluding that petitioner knew or should have known of the existence of the Federal Home Loan Bank Board examination report well in advance of trial. Indeed, petitioner admitted prior knowledge of the existence of the report in his motion for a new trial. The purpose of the *Brady* rule is to assure that the government furnishes important exculpatory information that is known to it but not the defendant. *Brady* is not violated where the defendant knows of the existence of a document but fails to make a timely motion for its production. See *United States* v. *Ruggiero*, 472 F. 2d 599, 604-605 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States* v. *Riley*, 530 F. 2d 767, 771 (8th Cir. 1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. MCMURRAY
Attorney

SEPTEMBER 1979

DOJ-1979-09

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-440-CR-SMA

UNITED STATES OF AMERICA, Plaintiff

vs.

CLAUDE DORSY, Defendant

ORDER

UNDER DATE of April 10, 1978 Defendant filed a Motion for Discovery and Production of Favorable Evidence (*Brady* v. *Maryland*, 373 U.S. 83 (1963)). On April 11, 1978 the government's response thereto was filed. On or about April 12, 1978 the first day of trial to a jury of the indictment and the Defendant in this action, this Court, having conducted an *in camera* inspection of a transcript of one statement of a witness that day furnished by the government as described in said Motion, ordered and directed that said statement in its entirety be forthwith produced and delivered to the Defendant. Thereupon the transcripts of three other witnesses were provided to the Court, and after an overnight *in camera* inspection, the Court ordered excerpts from two transcripts to be delivered to defense counsel on April 13, 1978 (during trial).

Government counsel, in addition to arguing the timeliness of the Motion, pointed out on April 13, 1978 that one of the statements requested by Defense Counsel consisted of an official report of an examination proceeding by the Federal Home Loan Bank Board to which the Department of Justice does not have access to and which would require an order of the Court to obtain its production. Such an order was signed by this Court

the same day (April 13, 1978) and government counsel sought the report from the Federal Home Loan Board, Washington, D.C.

The report of the Federal Home Loan Bank Board as to its examination of Dade Federal Savings and Loan Association, Miami, Florida was presented to the Court on April 20, 1978, the second day of the jury's deliberation of its verdict in these proceedings and, therefore, the day upon which the jury's verdict was returned.

Although this Court finds that there is merit to the government's argument as to the timeliness of the Defendant's Motion, nevertheless, the Court has conducted an *in camera* examination of said Report and finds that there may be material therein which could be considered as exculpatory, although cumulative. In view thereof this Court feels duty bound to make a ruling on the matter at hand, notwithstanding that the verdict of the jury has been received and entered in the record wherein Defendant has been found guilty and adjudicated guilty as to Counts I through XIV inclusive. In making this ruling this Court is not suggesting nor ruling at this time that even if the information in said Report is truly Brady material that it would have been significant with regard to the verdict returned. Thereupon, it is -

ORDERED AND ADJUDGED that the following specific portions of the Final Report and Recommendations appearing in a Federal Home Loan Bank Board Memo dated September 13, 1976, regarding the formal examination of Dade Federal shall be furnished forthwith by government counsel to the Defendant through his counsel, as follows:

(a) All of Section III of said Report containing the heading *Dorsey-Bridges Condominium Projects* commencing on Page 6 and extending through the third paragraph on Page 9 of said Report.

(b) Exhibit 3 attached [to] said report consisting of a letter dated September 1976 addressed to the Hon. Robert W. Rust, U.S. Attorney, by Daniel J. Goldberg, Acting General Counsel, Federal Home Loan Bank Board.

It is further -

ORDERED AND DIRECTED that the aforegoing portions of said Report shall be furnished for the exclusive use of the Defendant and his counsel in this cause of action and shall not be divulged, copied, circulated or otherwise transmitted by Defendant, his counsel, or anyone to any other person or persons without the prior order of this Court, and it is -

ORDERED AND ADJUDGED that the Report filed and received in this Court under date of April 20, 1978 together with all attachments shall be sealed by the Clerk and shall remain a part of the record of this action available only for Appellate purposes and use or as the further order of this Court may direct.

DONE AND ORDERED at Miami, Florida this 21 day of April, 1978.

/s/ Sidney M. Aronovitz

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-440-CR-SMA

UNITED STATES OF AMERICA, Plaintiff

v.

CLAUDE DORSY, Defendant

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL & MOTION FOR NEW TRIAL

THIS CAUSE was considered by the Court upon the following matters:

Defendant's Motion for Judgment of Acquittal made during trial pursuant to and under Rule 29(b) F.R.Cr.P. and Defendant's Motion for New Trial pursuant to Rule 33 of the F.R.Cr.P.

The Court has studied the motions, the very extensive Memorandum of Law filed by Defendant in support thereof, including the Supplemental Memorandum in Support of Defendant's Motion for New Trial, the Government's various responses thereto, applicable portions of the Court Record including the transcript of the trial herein; and thereupon being otherwise fully advised in the premises,

It is ORDERED and ADJUDGED as follows:

1) The Motion for Judgment of Acquittal made in behalf of the Defendant Claude Dorsy pursuant to and under Rule 29(b) F.R.Cr.P. be and the same is hereby DENIED.

2) The Motion for New Trial filed herein by Defendant Claude Dorsy be and the same is hereby DENIED. This Court has fully reviewed the subject matter argued in Defendant's Supplemental Memorandum in Support of his Motion for New Trial, particularly addressed to the failure of Government Counsel to produce to the Defendant in advance of trial segments of the Federal Home Loan Bank Board (FHLBB) Report on Dade Federal Savings & Loan Association. Defendant's grounds for new trial by reason of the aforegoing rests upon *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Agurs*, 96 S. Ct. 2392 (1976).

When this Court entered its post trial Order dated and filed April 21, 1978, whereby it ordered the production by the Government of the requested discovery after an *in camera* inspection, the Court noted therein that the Government had argued the timeliness of the Motion for Production. The Government urged that inasmuch as the FHLBB Report was with FHLBB, it in fact would require an Order of the Court for a copy thereof to be obtained from FHLBB after the specific Motion for Production of same had been made by Defendant on the date of commencement of trial. Such an Order was entered by this Court immediately - April 13, 1978. The existence of such a report was known or reasonably should have been known to Defendant in advance of trial and to the extent that it were deemed material and necessary, then a more timely Request for Discovery thereupon should have been presented to the Court. It should also be noted that Defendant Dorsy had moved in advance of trial for the Court to order the production of a specific FHLBB Report on Franklin Savings & Loan Association. This Court ordered that report to be produced. Relief could have been similarly afforded to the Defendant with regard to the Dade Federal Report had the request been timely made.

Under *Brady*, a finding of materiality is required in order to grant a new trial. *Giglio* v. *United States*, 407 U.S. 150, 154 (1970). See also *United States* v. *Agurs*, *supra* wherein the United States Supreme Court held that the burden of establishing materiality is not met unless the Defendant can show that the non-disclosed evidence would create a reasonable doubt as to the Defendant's guilt or innocence. The fact that individuals (officers or members of loan committees) at a savings and loan association may have been aware that false statements were being submitted is of no consequence to the jury's determination of the Defendant's guilt or innocence. *United States* v. *Niro*, 338 F. 2d 439 (2nd Cir. 1964). Here, as in *Niro*, the Defendant is charged with knowingly and willfully making and causing to be made false statements upon applications and other loan documents "for the purpose of influencing the actions of various institutions." And, as in *Niro*, the parallel of factual circumstances herein compared to *Niro* is significant. Here, the materials sought were cumulative. This Court cannot find that the Defendant made a timely Request for Production, nor that Defendant was prejudiced by reason of the failure to have available the requested and sought discovery prior to trial, nor that the nondisclosed evidence would have created a reasonable doubt as to Defendant's guilt or innocence.

DONE AND ORDERED at Miami, Florida, this 21 day of June, 1978.

/s/ Sidney M. Aronovitz

UNITED STATES DISTRICT JUDGE